Supreme Court, U.S.
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No. 87-657

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JACQUELINE FOWLER
Petitioner

vs.

THE BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY; JOSEPH G. BLAIR, INDIVIDUALLY AND AS SUPERINTENDENT OF THE LINCOLN COUNTY SCHOOLS; LLOYD McGUFFEY; JIM COOPER; IVAN SINGLETON; TOM BLANKENSHIP; AND PAUL PLAYFORTH, INDIVIDUALLY AND EACH IN HIS OFFICIAL CAPACITIES, RESPECTIVELY, AS A MEMBER OF THE BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a high school teacher who permits, then endorses, the showing as entertainment for her students of an "R" rated video containing indecent language, nudity, obscene figures, violence and sexual intercourse in her classroom during school is immunized from dismissal by the First Amendment to the United States Constitution.

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To the Honorable William H. Rehnquist, The Chief Justice, and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

Acceding to a request by two male students, Petitioner, Jacqueline Fowler, a civics teacher employed by the Lincoln County Kentucky Board of Education, permitted the videotape, "Pink Floyd-The Wall", to be twice shown in her classroom on the last day of school while grades were being recorded.

Petitioner had not previously seen the film. She did not review it before it was exhibited to her students, who were freshmen, sophomore and junior boys and girls 14 to 17 years of age. The picture was shown during class while school was in session at regular classroom periods. The purpose of the film was to entertain the students while report cards were being marked and distributed by the teacher who sat in the back of the classroom.

One of the boys, age 15, who had already seen the film and had recommended it as good entertainment told Mrs. Fowler it "had one bad place in it." Petitioner stationed this young man at the front of the room near the television set with an 8½ x 11 inch file folder. She instructed him to hold the folder in front of the 25 inch television screen to block out the scenes he thought the other students shouldn't see.

The videotape is an exact copy of an "R" rated motion picture containing indecent language, nudity, foreplay and sexual intercourse, an animated depiction of male private parts, a rape scene, implied oral sex, masochism and violence interspersed throughout the 90 minute presentation.

All portions of the soundtrack containing indecent language[1] were played to the students during both an afternoon and morning showing. As to both extent and effect, the file folder editing of visual material was indifferently successful. Some of the salacious material was at least partially blocked on one or other of the two screenings, but clearly much of it was not. (Petitioner's Appendix A-4).

All pretense of editing was abandoned while the teacher was absent from the room on several occasions. Even when Petitioner was in the classroom, she was examining her grade book, marking report cards and not paying much attention to the film.

Neither the students and their parents nor the school administration was forewarned of the nature of this film. There was no

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[1] The particular words used were the vulgar terms synonymous with sexual intercourse, excrement and male genitals.

discussion of the film before, during, between or following the two showings.

Perforce in retrospect, Petitioner contended during disciplinary proceedings resulting in her dismissal that the picture contained valuable "themes and messages." In permitting it to be shown, she asserts she was shielded by the First Amendment so that her discharge for conduct unbecoming a teacher was constitutionally invalid.

Following a bench trial, the district court agreed with Petitioner's position. The United States Court of Appeals for the Sixth Circuit, which viewed the film and analyzed the testimony, disagreed and dismissed Petitioner's claim.

SUMMARY OF ARGUMENT

1. The showing of an "R" rated film containing indecent language, nudity, scenes of foreplay, sexual intercourse, obscene figures, violence and rape to a captive audience of school children in the classroom is not entitled to First Amendment protection.

2. The school board was not required by *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) to fragment the film and to imagine, articulate or establish what action it would take had an altogether different version been shown instead of what was actually presented in the classroom.

3. The conclusions reached by the Court of Appeals for the Sixth Circuit are entirely correct and consistent with the decisions of other circuits insofar as these bizarre facts can really be compared with any other reported cases. The underlying principles follow precisely the applicable considerations recently enunciated by this Court.

4.The decision in favor of the school board in no way suppresses any legitimate right of free expression nor poses any dilemma for other teachers who need only apprise themselves of the nature of the materials to which their students are to be exposed and to exercise common sense to avoid recurrence of an incident anything like this.

ARGUMENT

I.

The determination by the Court of Appeals is correct beyond need for further review. Last term, this Court in *Bethel School District*

No. 403 v. Fraser, 478 U.S. ___, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) stated that the education of youth involves more than "books, the curriculum and the civics class"; and that teachers "demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of the class. Inescapably, like parents they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil mature conduct cannot be conveyed in the school that tolerates lewd, indecent or offensive speech and conduct... ."

For those reasons, "(N)othing in the Constitution prohibits the states from insisting that certain *modes of expression* are inappropriate and subject to sanctions." (Italics added).

Nonetheless, Petitioner continues to seek constitutional imprimatur for "Pink Floyd-The Wall", despite its implied oral sex, anthropomorphic "flower scene" as the male penetrates the female while the blossoms assume human form, and a judicial figure which, from Petitioner's own perspective, is portrayed in animation as a giant penis with testicles around the neck.

Equally askew is Petitioner's reliance (and that of the dissenting judge in the Sixth Circuit) on *Cohen v. California*, 403 U.S. 15 (1971), *reh. den.* 404 U.S. 876 (1971), invoiving the vivid anti-draft message on the back of the defendant's jacket.

It is indeed true that the word displayed by Cohen is identical with one of the indecent words on the soundtrack of "Pink Floyd-The Wall". Even though the offensive use of foul language in a public place to express some viewpoint was not, in *Cohen*, a criminal offense that does not make the same language acceptable entertainment in a school classroom any more than an exhibition of "Carnal Knowledge", for example, might be endorsed simply because its exhibitors could not be jailed for obscenity for showing the film in a theater. *Jenkins v. Georgia*, 418 U.S. 153 (1974).[2]

In *Bethel School District No. 403 v. Fraser*, supra, this Court instead endorsed Judge Newman's observation that, "The First Amendment gives a high school student the classroom right to wear Tinker's

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[2] As in *Jenkins*, the nature and content of a film made part of the record was as accessible to an appellate court as to the trial court so that "Pink Floyd-The Wall" was properly reviewed independently by the Court of Appeals for the Sixth Circuit.

armband but not Cohen's jacket." A teacher serving as an example surely has no greater right.

This matter does not implicate genuine tension between the free expression of ideas by employees on school property and the educational system's task of exemplifying and imparting values. Jacqueline Fowler was not expressing ideas as a citizen on matters of public interest while she happened to be beyond the school house gate. c.f. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); or *Rankin v. McPherson*, 483 U.S. ____, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). Instead, she was conducting her classes within the course and scope of her duties as a teacher.

Unlike decisions typified by *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589 (1967), action was not taken by a public employer based on petitioner's own political views, or, for that matter, because she liked rock music, "R" rated motion pictures or really because of her own convictions about anything.

Nor was communication or expression improperly stifled. The motion picture is or was available on tape and in theatres where minors under age 17 could see it if accompanied by such consenting parents or adult guardians as might have different ideas about what their children should see; an option unfortunately not provided here.

This kind of material has always been available to those who seek it. School administrators realize that students outside school hours can gain access to just about anything. None of this means that schools aspiring to different goals from the purveyors of indecency are powerless to act when the classroom becomes the forum and the school the involuntary sponsor of such exhibitions, which need not descend to the level of child pornography to be rejected as a legitimate school event. c.f. *Ginsberg v. New York*, 390 U.S. 629, *reh. den.* 391 45971 (1968), 390 U.S. 629 (1968).

As with most films, this picture does tell a story — that of a rock music star, "Pink Floyd", who becomes a drug addict and goes insane because of various misfortunes he perceives have befallen him, including the death of his father in the war, an over-possessive mother, an unfaithful wife, a harsh school and annoying female rock "groupies"[3].

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[3] These are the young women who remove their upper clothing in the "Young Lust" sequence.

Years ago in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court characterized freedom of expression as a joinder of belief and conduct. Since Jacqueline Fowler had not seen the film, there remained, as the Court of Appeals correctly held, only her conduct in permitting the film selected by two boys to be shown in her class.

After an evidentiary hearing, the school board explored and discussed with Petitioner and her attorneys alternatives to dismissal, including some assurance this kind of incident would not recur. Instead, petitioner insisted that the film's themes and messages cloaked her with First Amendment protection, notwithstanding the school board's concerns.

Petitioner has never suggested, however, that any message evoked by this rock video could not have been expressed other than through the medium of indecent language, obscene figures, upper female nudity, sexual intercourse and masochism. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *reh. den.* 439 U.S. 883 (1978).

It is argued that films, just as other modes of expression, are entitled to First Amendment protection. That is not the question here. All manner of speech is not protected at all times irrespective of what is said and where it is said. Neither is a film protected regardless of the circumstances in which it is shown.

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), it was recognized that the public commercial exhibition of a motion picture containing some indecent material may not be suppressed simply because some children might see it, just as *Cohen* was not subject to the prosecution in part because persons who might be offended could avert their eyes. In contrast, "Pink Floyd-The Wall" was directed at the students who were supposed to see it. That was the only reason it was shown.

II.

Petitioner strives to shape the holding in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) to urge that if any part of the motion picture was unobjectionable, the school board could not validly discharge her unless it had fragmented the film to imagine a photoplay without indecent language, nudity and other fulsome materials.

The rationale of *Mt. Healthy* places an offending employee in no better position just for having engaged in protected expression. Where discrete acts are implicated, proof that the employee would

have been discharged irrespective of protected expression may, if such evidence exists, be adduced and presented.

The school board did not appreciate some of the "messages" claimed for this film, as, for example, a scene where school children revolt, vandalize and burn down the school and carry an unpopular teacher out to an unpleasant fate; or another, the "neo-Nazi" sequence, during which the hero tells his henchmen to take out the "coons" and "queers" and shoot them. A rape scene, explicit brutality and an episode during which the hero lacerates his bare chest with a broken razor blade were not well received.

In any case, all five school board members strongly objected to the sexual content, vulgarity and violence contained in the movie (Petitioner's Appendix, A6). Material of that nature recurs continually throughout the entire film. It was simply impossible for the school board to hypothetically envision a totally expurgated film and then to speculate and offer substantive proof regarding what action would have been taken had an entirely different motion picture been presented from that actually shown.

Judge Merritt's dissent contending that the teacher's "academic freedom" to express themes and messages should not be subsumed by the vulgar mode of expression is misconceived for at least three distinct reasons:

1. Even to the extent "academic freedom" may exist in the high school setting in the sense of recognizing a teacher's right to teach subjects as she sees fit,[4] no such right has even been claimed here for this motion picture presented as entertainment. Moreover, the fact that it was intended as entertainment instead of a school subject did not grant the teacher carte blanche to abdicate her responsibilities as an exemplar. "Certainly a state also may take into account a teacher's function as an example for students which exists independently of particular classroom subjects." *Ambach v. Norwick*, 441 U.S. 68 (1979).

2. "The medium is the message". As this Court observed in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), *reh. den.* 413 U.S. 881 (1973), "Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved

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[4] The "freewheeling inquiry" in the university setting surely differs from the goal of illustrating values for adolescent children.

to a bar or 'live' theater stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

3. Reliance on *Cohen v. California*, supra, is misplaced, in light of this Court's discussion of that decision in *Bethel School District v. Fraser*, supra. School administrations may and should require standards higher than merely refraining from criminal obscenity. Rather, "(T)he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Bethel School Dist. No. 403 v. Fraser*, supra.

III.

Petitioner contends the decision of the Court of Appeals for the Sixth Circuit conflicts with that of another circuit, citing *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969). A vulgar term was used to make a scholarly point in an article in the "Atlantic Monthly" written by a psychiatrist and professor. The article was distributed to high school seniors as part of an English assignment. Apart from the obvious factual distinction between an article in the "Atlantic Monthly" and the motion picture "Pink Floyd-The Wall", the petitioner, Jacqueline Fowler, claims no academic relevance whatever.

The indecent language, nudity and obscene materials occurring throughout this motion picture were not included for scholarly analysis but to shock and titillate the sensibilities of an audience composed of students under the teacher's care.

IV.

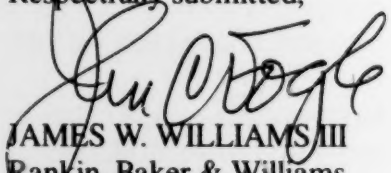
Finally, petitioner fears that affirmance of the Sixth Circuit's decision would discourage the classroom presentation of serious literature, including Shakespeare and Chaucer. Should some entrepeneur come up with a topless film of a Shakespearean play, the Bard's unwitting participation would not transform the production into befitting classroom amusement. As this Court once remarked, "(A) quotation from Voltaire in the fly leaf of a book will not constitutionally redeem an otherwise obscene publication...". *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972).

Fear of teacher uncertainty is groundless. The problem encountered by Jacqueline Fowler can easily be avoided by previewing the material to be presented. Any competent teacher could then readily distinguish worthwhile literature from the film, "Pink Floyd-The Wall".

CONCLUSION

For the reasons set forth above and in the well considered opinion of the United States Court of Appeals for the Sixth Circuit, the petition should be DENIED.

Respectfully submitted,



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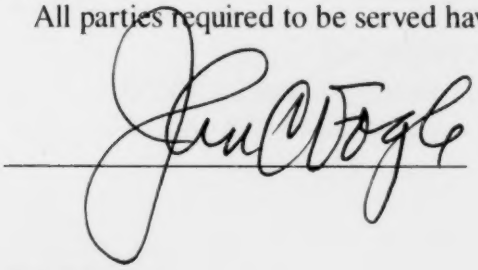
CERTIFICATE OF SERVICE

John C. Fogle, a member of the Bar of the Supreme Court of the United States and counsel of record for Respondents herein, hereby certifies that on November 17, 1987, pursuant to Rule 28 of the Revised Rules of the Supreme Court of the United States, he served three (3) copies of the foregoing Brief For Respondents in opposition to writ of certiorari on Petitioner, Jacqueline Fowler, as follows:

On November 17, 1987, by depositing such copies in the United States Post Office at Mt. Sterling, Kentucky, with first class postage prepaid, properly addressed to the post office address of Arthur L. Brooks and Jane V. Fitzpatrick, above named Petitioner's counsel of record at 183 North Upper Street, Lexington, Kentucky 40507.

All parties required to be served have been served.



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